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Court of Appeals No. 38921-5-II

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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BRUCE CEDELL, a single man,

Plaintiff/Petitioner,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Defendant/Respondent.

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APPEAL FROM COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON NO. 38921-5-II

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**SUPPLEMENTAL RESPONSIVE BRIEF TO RESPONDENT'S  
ANSWER TO THE WASHINGTON STATE ASSOCIATION FOR  
JUSTICE FOUNDATION AMICUS CURIAE MEMORANDUM**

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## **I. IDENTITY OF PETITIONER**

Plaintiff, Bruce Cedell, petitions the Court for discretionary review of the Court of Appeals decision below.

## **II. COURT OF APPEALS DECISION**

A copy of the decision is on file already.

## **III. ISSUES PRESENTED FOR REVIEW**

Should the court of appeals decision be reversed.

## **IV. STATEMENT OF THE CASE**

(Previously stated.)

## **V. ARGUMENT**

In the present case, Farmers does not cite any first-party insurance cases where it was held that the insurance company's lawyer, who was actively involved in handling the claim itself were privileged, unless the fraud exception applied, other than Escalante v. Sentry Insurance Company, 49 Wn. App. 375, 743 P.2d 832 (1987) and Barry vs. USAA, 98 Wn.App. 199, 989 P.2d 1172 (1999).

Farmers fails to recognize that in a first-party insured fire case, that they owe a quasi-fiduciary duty to their insured, in this case Mr. Cedell. Unlike the UIM cases cited by Farmers, first party coverage is not supposed to be by nature, adversarial. And it is not a foregone conclusion that there will be inevitable conflict between a company and its insured. Both UIM cases cited by Farmers make it clear that is the situation in a UIM case. UIM cases are not typical first-party insured situations because of these facts. In the present case, every action of Farmers' attorney, whether in conducting an investigation, taking depositions of witnesses

and Mr. Cedell, or engaging in the settlement negotiations himself, should be conducted with recognition of the quasi-fiduciary duty which exists between the company and its insured. Since an attorney hired to carry out these tasks owes a fiduciary duty not only to the company but also to the insured, an inherent conflict of interest exists, which should prohibit the use of any claim of attorney-client privilege.

In the present case Farmers states that the allegations of Mr. Cedell are insufficient to allow the trial court to make a finding that a prima facie showing of bad faith tantamount to civil fraud existed.

1. Farmers alleges that the allegations made by Mr. Cedell are mere allegations of consumer protection violations and/or bad faith. To the contrary, Mr. Cedell's argument is a simple one. After the fire in the present case, Farmers became acutely aware that Mr. Cedell's damages by their own estimates exceeded \$100,000.00.
2. Farmers recognized that if the fire was accidental that they owed Mr. Cedell a duty to pay him that amount.
3. Farmers was aware and has admitted in its answers to interrogatories, of the following facts:
  - a. Bruce Cedell, their insured, was not home when the fire broke out.
  - b. Mr. Cedell, their insured, did not conspire with anyone to set the fire.
  - c. That Farmers had no evidence that the fire was of incendiary origin.

d. That Farmers had absolutely no evidence that the fire in the present case was anything other than accidental.

Being aware of the above facts, Farmers intentionally and knowingly attempted to coerce Mr. Cedell into accepting \$30,000 (an amount far less than the acknowledged true damages that Farmers estimated) and attempted to cheat him out of at least \$70,000.00.

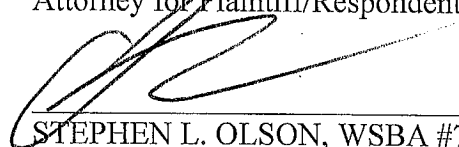
4. The fact that the perpetrator of fraud in this case is an insurance company rather than a flim flam man who is driving through town, does not mean that this is not an allegation of fraud, or that when such acts are committed by a large company it is only a consumer protection/bad faith violation.

## VI. SUMMARY / CONCLUSION

The Court should hold that no attorney-client privilege exists in a first-party insurance bad faith action. Further, Farmers' actions are sufficient for the court to make a finding that the fraud exception should be applied and the ruling of the Court of Appeals to the contrary is error.

RESPECTFULLY SUBMITTED on March 15<sup>th</sup>, 2011.

OLSON, ZABRISKIE & CAMPBELL INC.  
Attorney for Plaintiff/Respondent

  
STEPHEN L. OLSON, WSBA #7489

Certificate of Service by Mailing

I declare under penalty of perjury under the laws of the State of Washington that on March \_\_\_\_\_, 2010, I caused to be deposited a true and correct copy of the Supplemental Brief to which this certificate is attached, via United States Postal Service, proper postage affixed thereto, to:

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Dated March 16, 2011, at Montesano, Washington.

  
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